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Supreme Court of the United States

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Appellant,*

v.

UNITED ARTISTS CORPORATION, A CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINION BELOW

The findings of fact, conclusions of law and opinion of the court below are contained in the record (R. 33-43), and reported in 23 Fed. Supp. 353.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1, of this Court. It is not controverted that Section 238 of

the Judicial Code, as amended, confers jurisdiction upon this Court. Probable jurisdiction was noted on the 10th day of October, 1938.

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia, rendered by a three judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 USCA 380) (R. 31-33). The case involves the constitutionality and applicability of certain provisions of the West Virginia Business and Occupation Tax Law, as set forth in Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935, amending Chapter 11, Article 13, Code of West Virginia, 1931, as amended by Chapter 33, Article 13, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, as applied to the United Artists Corporation, a Delaware Corporation, having its cl. ef office in New York City, respecting certain activities engaged in by it in the State of West Virginia in and about the exhibition of its motion picture films therein.

The Act (*infra*, Appendix) imposes taxes at varying rates upon various businesses conducted within the State of West Virginia, the parts thereof here involved being Sections 2-(h) and 2-(i) imposing a tax of one per cent. (1%) (Section 2-[h]) (R. 6) upon every person engaged in this State in any service, business or calling not otherwise specifically taxed under this law, and (Section 2-[i]) (R. 6) upon every person engaging or continuing within this State in the business of collecting incomes from the use of real or personal property, or any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise.

A contract typical of that under which appellee carries on its business is attached to the Bill of Complaint (R. 14A-14B), the terms of which are hereinafter detailed (*infra*, pp. 19-21).

Appellee brought this suit in equity to enjoin collection of the tax in question, claiming Federal jurisdiction because of diversity of citizenship; because the business and activities of appellee were conducted solely in interstate commerce, and hence, the tax sought to be levied and imposed would be an undue burden and hindrance upon said commerce, in violation of Section 8, Article I, of the Constitution of the United States; and because enforcement of the provisions of the Act would deprive appellee of its property without due process of law, and deny to it equal protection of the laws in contravention of the 5th and 14th Amendments to the Constitution of the United States (R. 12 and 13). Jurisdiction in equity was claimed because of the absence of an adequate remedy at law. Appellee applied for and insisted upon an interlocutory and permanent injunction. Appellant moved to dismiss the Bill of Complaint and filed an answer denying all material allegations of the bill, asserting that the tax in question was a valid and proper charge by the State. A stipulation of evidence was entered into and filed (R. 29-31).

DISPOSITION OF CASE BY TRIAL COURT

The Court below determined that the necessary amount to give the District Court jurisdiction was involved; that appellee had no adequate remedy at law, and hence, a court of equity had jurisdiction of the issue; that appellee had never been and was not then engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise,

and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of appellee in the carrying on of its business constituted "interstate commerce" (R. 41).

FINDINGS OF FACT

The Court reviewed and summarized certain material facts appearing from the stipulation relative thereto which it considered important in relation to the discussion in the opinion of the Court (R. 33-41).

FINAL JUDGMENT

The Court awarded a permanent injunction enjoining the enforcement of the statute in question against appellee (R. 31-33).

STIPULATION OF EVIDENCE

The stipulation of evidence adopts as the facts of the case the allegations contained in the bill of complaint with certain modifications (R. 29-31). These facts may be summarized as follows:

Appellee is a corporation created and existing under the laws of the State of Delaware, having its principal office and chief place of business in the City of New York. It is a citizen and resident of the State of Delaware (R. 3). Appellant is the State Tax Commissioner of the State of West Virginia, and as such is charged with the duty of enforcing and administering the tax laws of that State (R. 3-4).

Appellee maintains branch offices in other cities in the United States, to-wit; Cleveland, Ohio, Pittsburgh, Pennsylvania, and Washington, D. C., but maintains no office in West Virginia. Its business in general is the soliciting of and having theater owners and exhibitors

in the State of West Virginia to exhibit its motion picture films in said State, and for which said exhibitions it receives certain fees, rentals or royalties. To accomplish these purposes, appellee from time to time makes public announcement of the motion pictures it has or will have for release. Theater owners or managers, who desire to exhibit such motion pictures, make written application in the form of an offer to appellee at its place of business in New York through a representative of appellee who spends approximately one-half of his employed time in West Virginia encouraging and soliciting theater owners and managers to exhibit appellee's films, said representative thus procuring the signatures of said theater owners and managers to said written applications (R. 4 and 30). Appellee, at its main office in the City of New York, rejects or accepts such applications and offers (R. 4).

A contract typical of that under which the activities of appellee are carried on is attached to and forms a part of the Bill of Complaint (R. 14A-14B). It provides that the motion picture films therein specified, or to be selected, will, at the time or times specified or provided for, be sent to the exhibitor by appellee, with the authorization to exhibit such films for a certain number of days fixed by the contract. The contract provides that for this right to exhibit such films, the exhibitor will pay appellee sometimes a specified sum of money fixed by the contract, and sometimes a specified percentage of the receipts from theater admissions during the day or days the picture is exhibited. Further provision is made therein that at the end of the exhibition period as specified, the exhibitor will, at the direction of appellee, ship the film or films by carrier designated by appellee to some other exhibitor, or return the same to appellee. During 1936, with two exceptions, the films of appellee exhibited in West Virginia were returned, pursuant to

the direction of appellee, to appellee outside West Virginia, the exceptions being occasions when an exhibitor within the State was directed by appellee to forward the film to another exhibitor within the State (R. 30). Upon receipt of the films of appellee from one of its branch offices without the State, or from another exhibitor within the State, they being sent by express, parcel post or other carrier, the exhibitor exhibits the same in ordinary motion picture theaters, and charges an admission fee to such of the public as desire to see the exhibition thereof (R. 5). When this use of the pictures is completed, they are, according to the contract, reshipped on advices given by appellee. The contract (R. 14A-14B) further provides that the exhibitor agrees to adhere in its newspaper advertising and publicity to the instructions issued to the exhibitor by appellee. The exhibitor agrees to charge as minimum admission to the theater for the exhibition of the films, certain prices for adults and children for matinees and after five p. m. certain other prices. *The right granted by this contract is to exhibit publicly the motion pictures and to reproduce publicly such recorded sound in synchronism therewith by the use of the positive print of the films delivered to the exhibitor by appellee.* When the fee to be paid by the exhibitor for the right to exhibit the films is to be computed upon a percentage basis, it is provided that such payment or part thereof shall be made to appellee at the end of each day's exhibition, together with a correct itemized statement of the gross receipts of the theate for admission thereto upon the exhibition date or dates of the motion picture for which payment is required, the same to be signed by the exhibitor, or his manager, and the exhibitor's cashier or treasurer. Appellee may require that such statement be made upon such forms as appellee may furnish to the exhibitor. On such date or dates, a representative of appellee is given the right to verify the

sale of all tickets of admission to said theater and the receipts therefrom, and for that purpose has access to the theater and the box office and also the right to examine the books and records of the exhibitor relating to such gross receipts. Appellee, or its representative, also has access, for a period of one year after the receipt by appellee of each final box office statement, to all the exhibitor's books and records for the purpose of verifying the exhibitor's statement. The exhibitor is further bound to segregate appellee's share of the gross receipts as the admission moneys are paid into the box office, and not to intermingle such funds with any other moneys, *and to hold such percentage share of such gross receipts in trust for appellee,* and to pay appellee such trust funds daily, such share of the gross receipts being and becoming the exclusive property of appellee from the moment the same is paid into the box office. During the year 1936, admissions to theaters in the State of West Virginia were checked by appellee on eight separate occasions (R. 30) for the purpose of ascertaining the receipts from theater admissions during the day or days when the pictures of appellee were being exhibited therein, to arrive at the correct amount due the appellee on a percentage basis for the privilege of exhibiting said films. These checks were made by an independent contractor acting for appellee (R. 30-31). The record does not disclose the number of occasions when appellee's films were exhibited in West Virginia on a percentage basis. The contract (R. 14A) provides that upon failure of the exhibitor to exhibit or pay for the exhibition when the use of the film is upon a flat fee basis, the fee therefor is to be the measure of damages the exhibitor will owe appellee for such failure, and in case the use is to be paid for upon a percentage basis, the exhibitor agrees to pay appellee as liquidated damages for each day for failure or refusal to exhibit the film a sum equal to such percentage of a cer-

tain daily average of the gross receipts of the theater, and a sworn statement of such daily gross receipts is to be furnished appellee by the exhibitor upon demand; that the exhibitor shall exhibit each picture in its entirety and shall not copy, duplicate, subrent or part with possession of any print thereof or mutilate the same, other than to make necessary repairs thereto, or when required by duly authorized public authority, or with the written or telegraphic consent of the appellee, the same to be returned in the same condition as received, reasonable wear only excepted; that if the exhibitor is granted, under the contract, a second or subsequent run, appellee has the right in its sole discretion to advance the exhibitor's run by giving notice in writing to such effect, whereupon the exhibitor is bound to exhibit such film in accordance with such notice, even though the exhibitor's run thus becomes a first run and there are no runs prior thereto; that if the exhibitor is granted thereunder a second or subsequent run, the exhibitor agrees not to advertise the film, except by means of advertisement inside his theater, not intended for removal therefrom by the public, prior to the exhibition of said film by any other exhibitor having the right to the first or prior run, and that violation of this clause subjects the exhibitor to pay appellee a sum equal to the damage caused the other exhibitor, and appellee may, at its option, terminate the right to exhibit the film; that exhibitor must adhere, in all newspaper advertising and publicity to the instructions of appellee; that exhibitor shall pay to appellee, upon demand, any tax, fee or other like charge imposed upon the delivery and/or the exhibition of the films and/or upon the sums payable under the license to so exhibit.

Appellee, conceiving the provisions of the taxing statute herein involved inapplicable to itself, has never made any estimates, reports or returns pursuant thereto, nor has it paid any tax thereunder. Appellant, however,

acting under the provisions of the statute and conceiving appellee to be liable for the payment of a tax of one per cent (1%) of the gross proceeds collected and received by appellee for the exhibition of its motion pictures in West Virginia, made an assessment, pursuant to the statute, for taxes due thereunder as of October 1, 1936, in the amount of Four Thousand Four Hundred and Two Dollars and Nineteen Cents ($4,402.19), and has demanded that appellee pay said sum, and further pay a like tax upon such gross proceeds after October 1, 1936, and has threatened to undertake to enforce the collection of the tax so assessed with accrued penalties and those to accrue, by bringing against appellee actions at law in the counties in which appellee's films are being shown, or will be shown, and sue out attachments and make the exhibitors of appellee's films garnishees thereunder, and to distrain appellee's films in the possession of exhibitors in the State, and to institute suits in chancery in the courts of the counties of West Virginia wherein appellee's films are shown to enjoin the further showing thereof until full payment shall be made of all taxes and penalties due from appellee (R. 10-11).

SPECIFICATIONS OF ERRORS RELIED UPON

Appellant will rely upon the assignment of errors filed with the petition for appeal (R. 47-49), and upon the statement of points to be relied upon set forth in the statement under Rule 13, Paragraph 9 (R. 51-52), the same being as follows:

ASSIGNMENT OF ERRORS

1. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the appellee the West Virginia Business and Occupation Tax (Sections 2-[h] and 2-[i],

Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the appellee never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interests or otherwise.

2. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the appellee the West Virginia Business and Occupation Tax (Sections 2-[h] and 2-[i], Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the acts of the plaintiff, in and about the exhibition of its films in West Virginia, and the receiving of moneys therefor, constitute "Interstate Commerce".

3. The court erred in awarding the permanent injunction prayed for in the bill of complaint.

STATEMENT OF POINTS TO BE RELIED UPON

POINT I.

Appellee is engaged within the State of West Virginia in the business of collecting incomes from the use of real

or personal property, or an interest therein, whether by lease, conveyance or otherwise, and whether the returns be in the form of rents, royalties, fees, interests or otherwise.

POINT II.

The business of the appellee in the State of West Virginia is purely local and intra-state, any interstate character of appellee's business having ceased when its films arrived in West Virginia, and the package in which they were contained was broken so that thereafter the use of said films and the income derived therefrom in the State of West Virginia is a purely intra-state activity and hence taxable by said State.

POINT III.

Any part of appellee's activities with respect to its business in West Virginia, in the exhibition of its films, which might be said to be in interstate commerce is purely incidental to the local performance of its activities in West Virginia. That for which the appellee received its rentals and fees was an activity purely local in character, carried on entirely within the State of West Virginia.

SUMMARY OF ARGUMENT

I.

Aside from any connection with interstate commerce, appellee is doing business in West Virginia.

Flint v. *Stone Tracy Co.*, 220 U. S. 107;

Von Baumbach v. *Sargent Land Company*, 242 U. S. 503;

Chemung Iron Co. v *Lynch*, 269 Fed. 368;

International Harvester Co. v. *Kentucky*, 234 U. S. 579;

Cone v. *New Britain Mach. Co.*, 20 F. (2d) 593;

Mandel Bros. v. *Henry A. O'Neil, Inc.*, 69 F. (2d) 452;

Equitable Life Assurance Society v. *Pennsylvania*, 238 U. S. 143;

Rex Beach Pictures Co. v. *Harry I. Garson Productions*, 209 Mich. 692;

Short Films Syndicate Co. v. *Standard Film Service Co.*, 39 Ohio App. 79;

Laurentide Co. v. *Durey*, 231 Fed. 223;

United States v. *Interstate Circuit*, 20 F. Supp. 868.

II.

For purposes of Federal regulation or supervision, the activity sought to be taxed may be considered interstate in character, yet that presents no obstacle to the power of West Virginia to tax this activity purely local in character.

Swift & Co. v. *United States*, 196 U. S. 375;

Stafford v. *Wallace*, 258 U. S. 495;

Wiloil Corp. v. *Pennsylvania*, 294 U. S. 169;

Minnesota v. *Blasius*, 290 U. S. 1;

Federal Compress & Warehouse Co. v. *McLean*, 291 U. S. 17;

Binderup v. *Pathe Exchange*, 263 U. S. 291;

Coverdale v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604;

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250;

Bacon v. *Illinois*, 227 U. S. 504;

United States v. *Interstate Circuit*, 20 F. Supp. 868.

III.

The exhibition of appellee's films in West Virginia is a purely local activity, subject to a nondiscriminatory tax by the State. Any resultant burden on interstate commerce is indirect and incidental.

Bacon v. *Illinois*, 227 U. S. 504;

American Steel & Wire Co. v. *Speed*, 192 U. S. 500;

Diamond Match Co. v. *Ontonagon*, 188 U. S. 82;

Browning v. *Waycross*, 233 U. S. 16;

Minnesota v. *Blasius*, 290 U. S. 1;

General Railway Signal Co. v. *Virginia*, 246 U. S. 500;

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J. D. Adams Manufacturing Co. v. *Storen*, ____ U. S. ____; 82 L. Ed. 870;

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465;

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Fox Film Corp. v. *Trumbull*, 7 F. (2d) 715;

Boynton v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851;

United States v. *Interstate Circuit*, 20 F. Supp. 868;

Eureka Productions, Inc. v. *Lehman*, 17 F. Supp. 259;
Motion to affirm granted 302 U. S. 634;

Paul v. *Virginia*, 8 Wall. 168;

New York Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495;

Sonneborn Bros. v. *Keeling*, 262 U. S. 506.

ARGUMENT

I.

ASIDE FROM ANY CONNECTION WITH INTERSTATE COMMERCE, APPELLEE IS DOING BUSINESS IN WEST VIRGINIA.

It was contended, and the lower Court concluded as a matter of law, that appellee had never been and was not then engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees or otherwise (R. 41), so as to be subject to the tax imposed by the West Virginia statute upon persons engaged within that State in such business. While it is thought that the question of whether or not the activities of appellee in West Virginia are taxable by said State is so closely related to and a part of the question of whether or not such activities are a part of interstate commerce, so as to make the same a proper subject for discussion in that respect only, it is believed that a discussion of the question of "doing business", in view of the conclusion of the lower Court, should be had without reference to any phase of interstate commerce which might be involved, such to be discussed in detail later.

As was pointed out in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, a film without the right of exhibition would be useless in either intra or inter state economics. It is, of course, realized that many things are done to make possible the exhibition of a film, but in the last analysis the exhibition thereof is that for which all other efforts are expended. The only value of a motion picture film is its value for exhibition purposes. It is reasonable to say, therefore, that that which is of value is

that in which the owner thereof naturally is most interested, and which, in the ordinary course of events, he desires to protect and reap the maximum benefit for himself therefrom.

"Business" and "doing business" are comprehensive terms. This Court, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, observed that such embraces everything about which a person can be employed, and is that which occupies the time, attention and labor of men for livelihood or profit. It was further pointed out in *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, at page 516, that, "It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court"; and in *Short Films Syndicate Co.* v. *Standard Film Service Co.*, 39 Ohio App. 79, it was held that the question of doing business within a particular State is not a question of law, but a question of fact, and that each case must rest upon its own facts. So, looking to the facts of some of the adjudications on this subject, we find in *Von Baumbach* v. *Sargent Land Company, supra*, the Court holding that certain realty companies engaged in handling tracts of land owned by them; leasing and selling parcels thereof; disposing of stumpage and seeing that their lessees under mining leases lived up to their contracts, were doing business in the particular State, so as to be subject to an act of that State imposing an excise tax, measured by annual net income, for the privilege of doing or carrying on business in a corporate capacity.

In *Flint* v. *Stone Tracy Co., supra*, wherein a tax was assessed for the privilege of doing business in a corporate capacity, the Court held that corporations engaged in the activity of leasing a hotel; that another which owned and leased ore lands for the purpose of carrying on mining operations and received therefor a royalty depending

upon the quantity of ore mined; and another owning and leasing taxi-cabs and collecting rents therefrom, were doing business in the State within the meaning of the statute. In *Chemung Iron Co.* v. *Lynch*, 269 Fed. 368, a company which sub-leased ore lands for mining purposes and received a royalty therefrom, and which employed an engineer to supervise the work of the lessee, and expended money to ascertain that all the ore was taken from its lands, was held to be doing business within the particular State, so as to subject it to the corporation tax act of that State. The case of *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, holds that a non-resident company, by continuous solicitation through local agents of orders which were sent to the company out of the State for articles which were then delivered within the State where the orders were given, and where such agents had authority to receive the payments therefor and to take notes payable at banks in the State, was doing business in said State to the extent that the company was amenable to the process of that State by service thereof upon its agents. In *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, a two per cent privilege tax upon the gross premiums from business done in that State was held valid, although the company was not a resident of the State, it, however, having a large number of policy holders therein who paid their premiums to the company at its office without the State, the company thus "doing business" in the State. The Court pointed out that many incidents of the contract were likely to be attended to in Pennsylvania, such as the payment of dividends when received in cash, sending an adjuster into the State in case of dispute and in making proofs of death. In *Rex Beach Pictures Co.* v. *Harry I. Garson Productions*, 209 Mich. 692, certain rights being in dispute under a contract and subcontract for the renting and distribution of a certain motion picture, not unlike the present contract, the ques-

tion arose as to whether or not the owner of the film, a non-resident of the State, was doing business therein. The Court pointed out that all bookings of the films were to be approved in writing by the owner, and were not effective until so approved, and that all funds derived from the rentals of the picture were to be regarded as trust funds in the hands of the collector thereof. The Court in holding that the film owner was "doing business" in the State, observed that the agreement by its terms was an invasion of the State by a foreign corporation, not simply for the purpose of making sales of products manufactured and delivered in a foreign State, nor was it a single act of business without intent or purpose to do any other business, but was "for the express purpose of extending and establishing its business permanently within the State." *Laurentide Co. v. Durey*, 231 Fed. 223, involved the question of whether or not a Canadian corporation was subject to the revenue act taxing the net income of foreign corporations engaged in business in the United States. The Court, in holding that the foreign corporation was engaged in such business pointed out that although it was true some of the business connected with its transactions was to be done in Canada, that all the conditions of the contracts were not to be complied with there, in that, most of them and in fact the most important ones, were to be performed in the United States. These cases are merely illustrative of the wide variety of facts and circumstances which have been taken into consideration with respect to the question of whether or not "business" was being done within a State.

So, reverting to the broad principle that "business" embraces everything about which a person can be employed and is that which occupies the time, attention and labor of men for the purpose of livelihood or profit, and that each particular case must be judged upon the

facts thereof, may we examine the facts here involved? The appellee is a foreign corporation. What are its activities in West Virginia, if any? It cannot be denied that it is vitally interested in the exhibition of its films. Its films are valueless except for exhibition purposes. The fruit of all its efforts is the local exhibition in West Virginia. Its general activities are described in the bill of complaint (R. 3-14) as limited by the stipulation of facts (R. 29-31). However, to best judge its powers, rights and activities in West Virginia, the typical contract under which it operates filed with the bill of complaint (R. 14A-14B), will more clearly detail to the Court the extent of its operations in this State. A representative of appellee spends approximately one-half his employed time in West Virginia encouraging and soliciting theater owners and managers to exhibit appellee's films, and procures the signatures of said owners and managers to the written contracts for said films (R. 4 and 30). Section "Third (b)" of the contract (R. 14A) provides that if the film is to be exhibited upon a percentage basis, payment therefor to appellee is to be made at the end of each day's exhibition, together with a correct itemized statement of the gross receipts of the theater, said statement to be made on forms furnished by appellee, if so required. Appellee thereunder is given the right to verify the sale of tickets and receipts, and for that purpose is given access to the theater and box office, with the right to examine the exhibitor's books and records relating thereto. Further right is therein granted appellee, or its representative, of access for a period of one year thereafter to all the exhibitor's books and records, and where an exhibition is on a percentage basis, appellee's share of the gross receipts paid into the box office are made trust funds, and the exhibitor is the trustee of appellee for such, said funds to be paid over daily and not to be commingled with any other moneys, the same to be the ex-

clusive property of appellee the moment paid into the box office. Thus appellee through its trustee is doubtless ever present in West Virginia collecting its income from such exhibitions. Section "Fourth" of the contract (R. 14A) provides for liquidated damages due appellee upon the failure of the exhibitor to exhibit its films. Section "Seventh" of the contract (R. 14A-14B) gives to appellee wide powers relating to the designation of the times for the actual exhibition of its films. Section "Eighth (a)" thereof (R. 14B) leaves the return or disposal of the film after exhibition entirely within the hands of appellee. In other words, the films having once reached their destination in West Virginia and having been exhibited, are solely at the disposal of appellee. Section "Tenth" thereof (R. 14B) gives appellee wide and sole power relative to the change of any picture specified in the contract as to story, book or play, adaptation thereof or the cost thereof. Section "Twelfth" (R. 14B) gives appellee the sole right to advance exhibitor's run of the picture in case the exhibitor is granted a second or subsequent run thereof. Section "Thirteenth" (R. 14B) limits the manner in which the exhibitor may advertise a second or subsequent run of a picture. Section "Fourteenth" (R. 14B) makes the exhibitor liable to appellee for any taxes appellee may have to pay by reason of the delivery, exhibition, etc. of the picture. If the contentions of the appellee are correct in this case, this provision is mere surplusage. Evidently some consideration was given to the likelihood of a tax having to be paid by appellee. Section "Sixteenth-10" binds the exhibitor to adhere in its newspaper advertising and publicity relative to the exhibition of the film to the instructions issued by appellee. It certainly must be recognized that the advertisement of the local exhibition of films is a vital force respecting the success or failure thereof. Appellee can completely control this. The same

section binds the exhibitor to charge certain minimum admissions for adults and children for matinees and for the same class of customers after five o'clock p. m.; thus giving appellee the very potent power to prescribe to a great degree what charge can eventually be made by exhibitor for the right of the public to view the exhibition. One, upon reading the contract in its entirety, is immediately struck with the lack of mutuality therein, in that, every advantage relative to the exhibition of the films is given appellee without corresponding advantages being granted to the exhibitors. Mutuality in the contract is conspicuous by its absence. Appellee, by contract, has reserved to itself unilateral control and supervision of that which is of greatest value to it, namely, the exhibition of the film.

So, entirely aside from the question of interstate commerce in this case, do not the facts concerning the activities of appellee in West Virginia more than amply show the doing of business in this State? Surely, a person so vitally interested in an activity within a State, the same constituting a continuous course of business therein, is as a matter of fact doing business in that State. The exhibition of the film is the thing. It is not merely a small part of some larger activity, but it is the fruition and culmination of all other activities which are merely incidental thereto including interstate commerce to whatever extent involved.

Appellee, in the lower Court and in its motion to affirm, cited two West Virginia cases: *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, and *United Shoe Repairing Machine Company* v. *Carney*, 116 W. Va. 224, as authority for the proposition that it is not doing business in this State. In our judgment these cases are not in point, and do not control. *Underwood Typewriter Co.* v. *Piggott*,

supra, merely involved the sale and delivery, by a foreign corporation, of typewriters in this State upon orders taken therefor by its agents and traveling salesmen, and forwarded to it. No activity on the part of the foreign corporation after the goods had been received in West Virginia and after interstate commerce had ceased, was involved. There was no provision for or attempted exercise of control and authority on the part of the seller after the goods were in West Virginia, hence the case is not comparable to the present one. *United Shoe Repairing Machine Co.* v. *Carney, supra,* involved a Maine corporation which had licensed persons in West Virginia to use certain shoe machinery for which the lessees paid the lessor certain rentals. The Supreme Court of West Virginia pointed out that *under the facts shown,* the activities of the Maine corporation were purely of an interstate character, but very pertinently observed that a foreign corporation does business within this State when it engages in corporate activities of a local character wholly separable from interstate commerce, and at page 227 said: "The only allegations implying that defendant's transactions with plaintiff were local are that he entered into an agreement with it at Huntington to use certain machines which were located within the State. The plea can not be extended any by presumption, since the law supposes that defendant stated his case most favorably to his contention." Of course, under such a meager showing of facts, it could not be successfully contended that the corporation was doing business in the State of West Virginia, but how different are the facts therein from the facts here involved. Another case relied upon by appellee on this point is that of *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451. This case involved a practice alleged to be in violation of the Clayton Act, and the decision in that case did not in any manner rest upon the doing of a purely local business within the State.

II.

FOR PURPOSES OF FEDERAL REGULATION OR SUPERVISION THE ACTIVITY SOUGHT TO BE TAXED MAY BE CONSIDERED INTERSTATE IN CHARACTER, YET THAT PRESENTS NO OBSTACLE TO THE POWER OF WEST VIRGINIA TO TAX THIS ACTIVITY PURELY LOCAL IN CHARACTER.

Conceiving that the question of taxability by the State of the activities of appellee in West Virginia in the last analysis depends upon whether or not such activities are a part or parcel of interstate commerce to the extent that State authority cannot be asserted or exercised relative thereto, and because of the great reliance by counsel for appellee and by the lower court on the case of *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and the application of the principles therein announced in the cases of *State* v. *Paramount Publix Corporation*, 178 La. 818, and *Paramount Pictures Distributing Co.* v. *Henneford*, 51 P. (2d) 385, certiorari denied 298 U. S. 665, we deem it well to point out that for purposes of Federal regulation or supervision an activity may be considered to be interstate commerce, but by reason of that fact it does not necessarily follow that the activity or a part thereof is not subject to State regulation and taxation. We do not seek to detract from the force of the principles announced in the *Binderup case*. This Court there held that a distributor of motion picture films under contracts comparable to the one at bar was engaged in interstate commerce, so as to be subject to Federal regulation under the Anti-trust Act. The activities there considered were those involving pure distribution of the films to a distributor in the State of Nebraska, who thereafter distributed them in that State for local exhibition, and the Court did not consider, it being unnecessary for its de-

cision, any activity relating to the actual exhibition of the films. The Court, however, very pertinently observed, at page 311: "The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, *are of little value to the inquiry here.* It does not follow that, because a thing is subject to State taxation, it is also immune from Federal regulation under the commerce clause." (Italics ours.)

To us the Court thus clearly indicates that although the distribution within the State, and the business of exhibiting films therein, might well be subject to Federal regulation under the Anti-trust Act or some other Federal Act, such does not mean that the State could not exercise control over such local activity. This Court further stated in *Stafford* v. *Wallace,* 258 U. S. 495, at page 525, in quoting from the case of *Swift & Co.* v. *United States,* 196 U. S. 375: " 'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the States'." So, all the incidents which might constitute an essential part of interstate commerce with respect to whether or not the same might be regulated in some manner by the Federal Government, are not thus necessarily and as a practical matter of taxation themselves removed from the field of State taxation. As was said by this Court in *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169, at page 175, in holding that a State excise tax imposed on each gallon of liquid fuel used or sold by distributors in the State of Pennsylvania, the same having been purchased outside that State and brought into the State in interstate commerce, was not an invalid burden on interstate Commerce: "We need not consider whether deliveries to purchasers ended the interstate commerce involved including all incidents that in other connections

might constitute an essential part of that which is covered by the commerce clause."

Even interstate commerce must pay its way, and the bare fact that one is carrying on a business which may be designated as interstate commerce in some respects does not necessarily relieve him of the many forms of State taxation which might add to the cost of his business. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250. It is only when the taxing power of the State presents an obstacle to, or may we say places a direct burden upon interstate commerce, that the tax is invalid. In *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, at page 23, it was said: "The mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

It is our contention that the exhibition of the films is purely local; that so far as the power of State taxation is concerned, they have come to rest within the State and have acquired a situs therein. Surely it would not be contended that the films are not subject to a property tax, as was considered in *Bacon* v. *Illinois*, 227 U. S. 504. But even in this condition, and with respect to their exhibition, they might properly be considered as a part of interstate commerce so as to permit regulation under the Anti-trust Act as was pointed out in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, at page 873:

> "While it is doubtless true that the exhibition, itself, of the moving picture is state commerce, and beyond the finger of regulation as interstate commerce, it is also true that the film without the right of exhibition would be useless in either intra or inter state economics. Therefore, a contract made in violation of the national anti-trust laws may not be unchallenged because the last step in its fruition is intra-state in character. This is not

placing the finger of the national government into the affairs of the state. It is saving national authority from paralysis, when the authority operates upon that which fruits at the end of an interstate trip. * * *"

Hence, merely because there is a flow of interstate commerce which is subject to the regulating power of Congress, it does not necessarily follow that in the absence of a conflict with the exercise of that regulatory power by Congress, a State may not lay a nondiscriminatory tax with respect to a local activity connected therewith. *Minnesota* v. *Blasius*, 290 U. S. 1.

Upon the above authority, we believe that although in the instant case it may well be that for certain purposes of Federal regulation the activities sought to be taxed in this particular case might be considered interstate in character, yet that presents no obstable to the power of the State of West Virginia to tax this activity of a purely local character. It is carried on in this State, after interstate commerce as a practical matter has ended. Coextensive Federal and State authority is permissible, as well as being highly desirable at times.

III.

THE EXHIBITION OF APPELLEE'S FILMS IN WEST VIRGINIA IS A PURELY LOCAL ACTIVITY, SUBJECT TO A NONDISCRIMINATORY TAX BY THE STATE. ANY RESULTANT BURDEN ON INTERSTATE COMMERCE IS INDIRECT AND INCIDENTAL.

A. The Mere Formation of the Contract Does not Place Appellee's Activities Within the Protection of the Commerce Clause.

The contracts under which appellee's activities are carried on in West Virginia are, of course, between citi-

zens of different States, and finally consummated in New York. However, that does not serve to place its activities within the protection of the commerce clause so as to prevent State taxation, if otherwise permissible. This Court, in *Paul* v. *Virginia*, 8 Wall. 168, and in *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, recognized this principle, and citing these two cases in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, said: "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question." We know of no congressional action with reference to the activities of appellee here, and, therefore, assume that the principle as stated is applicable in this case.

B. The Exhibition of Appellee's Films in West Virginia is a Purely Local Activity, Interstate Transportation Being Merely Incidental Thereto.

It is our view that interstate commerce is related only incidentally to the exhibition of appellee's films in West Virginia, in that, interstate transportation is merely induced or occasioned by the local exhibition. In Point I of our argument, (pp. 15-22, *supra*), we discussed in detail appellee's local activities, which, as said by the Court in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, were the fruition of all its efforts. It is true that the films themselves may move in interstate commerce so as to be available for exhibition, but the exhibition itself is that which induced or occasioned interstate transportation. As brought out in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, the events upon which the tax is conditioned occur in West Virginia and not elsewhere. In *Browning* v. *Waycross*, 233 U. S. 16, the question arose as to whether or not carrying on the business of erecting

lightning rods in the State was interstate commerce beyond the power of the State to regulate or directly burden, the contract therefor being entered into by parties of different States, and the performance thereof requiring the shipment of the rods in interstate commerce. The Court pointed out that the affixing of the lightning rods to houses was carrying on a business of a strictly local character, peculiarly within the exclusive control of State authority, and was a business wholly separate from interstate commerce, and did not involve a question of the delivery of property shipped in interstate commerce, or the right to complete an interstate commerce transaction, but concerned the doing of a local act after interstate commerce had completely terminated, hence the State might tax the same. See also *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500. In *East Ohio Gas Co.* v. *Tax Commission of Ohio,* 283 U. S. 465, a State excise tax had been imposed upon a corporation engaged in supplying natural gas to consumers within the State, based upon the gross receipts from the sale of gas piped from other States. In considering the question of whether or not the business carried on in the State was interstate commerce, the Court said at page 470:

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. * * * But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny

> streams that enter the small service lines, connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. * * *"

The Court, after citing several cases, continued at page 471:

> "* * * It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

We fail to see any great difference as to principle in that case and the one at bar. Here the films are shipped into West Virginia in compact, highly concentrated masses by interstate transmission, just as the gas was brought into the State in the above case, but with the completion of that movement the films are taken from their containers, put into projection machines in the State of West Virginia and there flashed upon the screens, whereby their stored up value is minutely broken down and divided so that it may be received by the many thousands of people who view these exhibitions. Is there any great difference between this and the activity in the above case where the volume of gas brought into the State in interstate commerce is expanded, treated and divided into many thousand relatively tiny streams, whereby the once concentrated mass of gas is made available to the thousands of commercial users thereof. We submit that the two cases are entirely comparable, and that the business

of exhibiting these films in West Virginia is as much a breaking of the original package after shipment in interstate commerce as could possibly be contemplated in any case. Substantially to the same effect are the cases of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, where, at page 245, it was said: "Interstate movement [of natural gas being transported from State to State] ended when the gas passed into local mains"; and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, the Court saying at page 308:

> "With the delivery of the gas [transported from one State to another State] to the distributing companies * * * the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. * * *
>
> "* * * The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies."

See also *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148.

We believe, moreover, that this Court has passed upon the specific question here involved, and has held that the exhibition of films in a State is a purely local act, to which interstate transportation is only incidental. In *Mutual Film Co.* v. *Industrial Commission of Ohio*, 215 Fed. 138, wherein an activity was carried on similar in almost every respect to that being considered, the Court said, at page 145:

> "It is claimed that the statute violates the commerce clause. Substantially all the films supplied

by complainants are manufactured outside the state of Ohio. The films are brought into the state in shipping packages containing one or more tin boxes in each of which is a film wrapped on a core. When the packages reach their destination in the state, they are opened and the films taken off the shipping cores and put on reels, and then placed in the stock of an exchange. The reels are then distributed among the exhibitors and passed from one to another for purposes of public exhibition. Some of these films circulate wholly within Ohio until worn out, while some remain there only for brief periods. It is to the films so placed on reels that the statute applies. The statute in terms limits the duty of the board of censors to examination of 'all motion picture films to be publicly exhibited and displayed in the state of Ohio.' They must be submitted to the board before they are delivered to exhibitors for exhibition, and the fees charged are fixed by uniform rates according to the length of 'each reel of film.' Section 3 of Act, supra. We are therefore not concerned with shipping packages which pass into and out of the state in their original form. It cannot be said that the act imposes any sort of burden upon the original shipping packages; for, when the packages are broken and their contents placed upon reels, the films have lost their distinctive character as articles of interstate commerce."

This Court affirmed that decision in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, and said, at pages 240 and 241:

"* * * It is true that, according to the allegations of the bill, some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters, and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other

> words, it is only films which are 'to be publicly exhibited and displayed in the state of Ohio' which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for renting for the purpose of exhibition within the state, could not be disclosed to the state officers. If this be so, whatever the power of the state to prevent the exhibition of films not approved,—and for the purpose of this contention we must assume the power is otherwise plenary,—films brought from another state, and only because so brought, would be exempt from the power, and films made in the state would be subject to it. There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state."

Of like effect are the following cases where activities were being carried on under contracts similar to that in the instant case: *Mutual Film Corp.* v. *Hodges*, 236 U. S. 248; *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715; *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851.

The Court observed that it is doubtless true that the exhibition itself of moving pictures is State commerce, and said in *Eureka Productions* v. *Lehman*, 17 F. Supp. 259, (motion to affirm granted 302 U. S. 634), at page 261:

> "We cannot accept the argument that the character of foreign commerce persists through the exhibition of the film in the state after its arrival. If, after a film passes in interstate commerce into a second state for exhibition, the regulatory laws of that second state are enforceable, we think the

same applies to a foreign film after its arrival and readiness for distribution and exhibition."

The same principles above discussed seem to apply with equal force to an activity local in character which takes place before interstate transportation begins. In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, a case involving a State license tax on the generation of electricity, which electricity was transmitted to consumers in another State, the following question in the words of the Court was presented, page 178:

> "* * * Upon the facts of the present case is the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce?"

The Court, pointing out that taxation is a practical matter, and that which constitutes commerce, manufacture or production is to be determined upon practical considerations, said at page 180:

> "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. * * *"

and at page 182:

> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intra-state, subject to state taxation and

> control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution * * *"

See also *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17.

The test of the power of a State to tax or regulate where interstate commerce is concerned is well stated in *Mandel Bros.* v. *Henry A. O'Neil, Inc.*, 69 F. (2d) 452, at page 455, the Court saying:

> "The test is whether the business done in the state of destination involves a 'question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction,' or whether it concerns 'merely the doing of a local act after interstate commerce had completely terminated.'"

We submit that the business of appellee sought to be taxed in the instant case is purely of the latter character.

C. Any Resultant Burden of the Tax Falls Only Remotely and Incidentally on Interstate Commerce, Hence Valid.

In *Sonneborn Bros.* v. *Keeling*, 262 U. S. 506, at page 510, Chief Justice Taft, speaking for the Court, stated:

> "* * * The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article, because of its relation to interstate commerce, depends on the question whether the tax challenged regulates or burdens interstate commerce."

It appears that a State may, to some degree, affect or burden interstate commerce, and it is only when that burden is direct and substantial that the same is invalid. Even interstate business must pay its way, and it is not

the purpose of the commerce clause to relieve those engaged in a form of interstate commerce from their just share of the State tax burden, even though it might increase their cost of business. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Browning* v. *Waycross*, 233 U. S. 16: *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. Here, the tax falls alike on all those engaged in interstate or intra-state commerce, or both. It is nondiscriminatory. Nothing in the contract requires or necessarily involves transportation across the State boundary. In *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, the Court observed at page 174:

> "These contracts did not require or necessarily involve transportation across the state boundary. * * * There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. * * *"

> "* * * As interstate transportation was not required or contemplated, it may be deemed as merely incidental. * * * The act lays no burden on interstate commerce as such and, if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources. * * *"

In *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, the Court said:

> "* * * The language of the state statute makes it quite certain that this privilege tax falls alike on

> those engaged in interstate or in intrastate commerce, or in both. While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained. * * * The present case falls well within the line of state tax authority."

The exemption of those engaged in interstate commerce from the taxation others bear is not to be extended beyond the necessity of keeping that commerce free from unwarranted interference. The West Virginia statute does not attempt to legislate respecting importation of films into this State brought from outside the State. In *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715, the Court said at page 723:

> "* * * The statute does not in terms legislate respecting importations into Connecticut of films brought from outside the state. It operates alike on films brought into the state and those produced in the state. It does not prohibit the bringing into the state of such films or prohibit or regulate the sale of such films. It is concerned only with the public exhibition of moving pictures within the state. Whatever burden or restriction the law imposes is purely incidental in so far as interstate commerce is concerned."

In *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851, the Court said, at page 853:

> "* * * It is our opinion that section 21-952, supra, by prohibiting the exhibition of such films on Sunday at theatres in Kansas, when they have come to rest in such state for the purpose of being exhibited by lessees thereof at such theatres, does not regu-

late or impose a direct burden on interstate commerce. * * *"

Where interstate movement has ended and local activity has begun, the local interest is paramount, and the tax upon this activity does not unlawfully burden interstate commerce, as was said by the Court in *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, quoting from *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298:

> "'With the delivery of the gas [transported from one state to another] to the distributing companies * * * the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. * * * In such case the effect on interstate commerce, if there be any, is indirect and incidental * * *. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.'"

See also *Eureka Productions, Inc.* v. *Lehman*, 17 F. Supp. 259.

D. The West Virginia Tax is Not One Which In Form or Substance Can Be Repeated by Other States in Such a Manner as to Lay an Added Burden on Interstate Commerce.

The tax, by its wording and operation is only to be applied as to the receipts of appellee for the local exhi-

bitions of its films in West Virginia. No contention is made, or could be made, that the tax is applicable to the income of appellee received from any other source. A tax could not be imposed by any other State upon this source of income for the reason that any attempt to do so would be extra-territorial, and would be a patent attempt to levy the tax merely because interstate commerce was being done. As was pointed out in *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604:

> "* * * Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter- and intra-state commerce and it cannot be imposed by more than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. * * *
>
> "* * * It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. * * *"

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, it was said:

> "* * * The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * *"

and also:

> "But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. * * * All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

Imposition of the tax in this case can give no rise to the evil pointed out by the Court in *J. D. Adams Manufacturing Co.* v. *Storen*, ____ U. S. ____; 82 L. Ed. 870, by the following language:

> "* * * Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. * * *"

E. Authorities Which Will Be Urged As Contra to the Views Herein Expressed.

In the lower Court, counsel for appellee relied principally upon three Court decisions. The lower Court also

relied thereon and same were urged as authority in appellee's motion to dismiss. They will doubtless be urged here, therefore, we deem it proper to discuss same, and to point out certain features therein distinguishing them from the present case.

We have heretofore discussed the case of *Binderup* v. *Pathe Exchange*, 263 U. S. 291, pp. 23-24, *supra*, and again wish to point out that the holding in that case does not militate against our contention in the present case. The sole question there considered was whether or not the distribution of motion pictures, the same being sent from one State to a distributor in another, was interstate transportation to the extent that same would be subject to the provisions of the Federal anti-trust act. The Court did not attempt to consider, it being wholly unnecessary for its decision, the question of the distributor doing a local business such as the control and supervision by himself, or his agents, trustees or employees of, to-wit: the actual exhibition of the films and the receipt of income from that activity. On the other hand, the Court indicated that such an activity would be within the power of the State to control. We have heretofore discussed this expression of the Court, page 24, *supra*.

In *State* v. *Paramount Publix Corporation*, 178 La. 818, a motion picture distributor operated in Louisiana under contracts evidently not unlike the present one, but we desire to point out that the reported case does not reveal the full extent of local activity therein carried on, as we have attempted to reveal with reference to the present case, and further that the films in that case were shipped to a distributor in Louisiana, and by that distributor sent out to the exhibitors in that State. There, the Court said that the tax sought to be imposed was upon "the business of leasing and distributing of motion picture films" in Louisiana, and held that same was merely an essential

part of the performance of the lessor's obligation under the contract of lease made without the State. We wish to point out that the tax which West Virginia seeks to impose upon appellee here is not a tax based upon "the business of leasing and distributing of motion picture films" in West Virginia, but is upon the business of collecting rents, royalties, etc., from the use of appellee's personal property in this State, or more specifically, the business of exhibiting its films in West Virginia. It may well be that between these purposes, there is not a clearly marked line of distinction, but we most earnestly insist that the Louisiana Court, in construing the privilege sought to be taxed conceived it to be one wholly connected with and inseparable from interstate commerce under the principles announced in the *Binderup case,* and proceeding upon that theory, it failed to consider the position we take in this case, namely, that the matter of distribution and leasing is of little moment, and that the activity in and about the exhibition of the films, which can only be local in character, is that which we insist is taxable by the State. The purpose of the tax, so the Louisiana Court observed, is well illustrated by this expression found at page 827 of the opinion:

> "As we have said, if the mere deliveries or distributions of the films of the Paramount Publix Corporation, by the exchange in New Orleans, were separate and independent business transactions, and not merely the fulfillment of the original interstate contracts and shipments, the occupation of delivering or distributing the films might be made the subject of state taxation, even though the Paramount Publix Corporation's entire system of doing business is, as the court decided in the Binderup Case, interstate commerce, subject to control under the Anti-Trust Act. *But the state has not levied the license tax upon the occupation merely of delivering or distributing the motion picture films,*

and is not seeking to collect the tax merely for such an occupation, but is seeking to collect the tax for 'the business of leasing and distributing of motion picture films.'" (Italics ours.)

We can easily agree with the Louisiana Court when it says that a state tax upon the *actual distribution of films is invalid.* That is a tax directly imposed upon interstate commerce. However, the purpose of our tax is entirely different, and does not seek to reach out and tax any privilege before it can reasonably be said that a local activity has been engaged in, we believing that the interstate transportation prior to the actual exhibition of the films in the State is purely incidental thereto.

Paramount Pictures Distributing Co. v. *Henneford*, 51 P. (2d) 385, (certiorari denied 298 U. S. 665), involved the applicability of the following tax statute: "There is hereby levied and there shall be collected from every person engaging or continuing within this state * * * in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent," to a distributor of motion pictures not a resident of that State. The contracts under which pictures were there distributed were perhaps generally in accordance with the present contract, although the case does not set out in any detail the extent of local activity, or may we say local control on the part of the distributor over the films when they were in the State of Washington for exhibition, as we have attempted to set forth herein relative to exhibition in West Virginia. There, the films were shipped to a local exchange which had solicited the theater owners and exhibitors to show the pictures of the distributor, and were, by the exchange, sent to such local exhibitors.

The Washington Court found that the local exchange was a link in interstate commerce, and further that *the business done by the local exchange* was a part of interstate commerce, and controlled by the decision in the *Binderup case,* wherefore the tax was declared to be invalid, it, in the opinion of the Court, placing a direct burden on interstate commerce. Here again the Court was construing the effect and purpose of a State statute. It conceived that the activity sought to be taxed was the activity of actual distribution, which, under the authority of the *Binderup case,* is, of course, interstate commerce to at least the degree that it may be subjected to Federal supervision under the Anti-trust Act, but the Court did no consider any other local activity of the distributor through its local exchange, *other than the activity of the actual distribution of the films to exhibitors.* Doubtless the Washington tax act was broad enough in scope to permit a tax such as we here insist upon as being valid, but the Court, in construing its own State statute, decided that the activity which was sought to be reached and taxed under the act was an activity entirely different from that which we insist is a proper subject of taxation. We respectfully direct the Court's attention to the dissenting opinion filed in that case, wherein it was said:

> "Notwithstanding the eminent authority upon which the majority rests its decision, I am convinced that it has misconceived the situation, has failed to see what operation is sought to be taxed, and has misapplied the doctrine of Binderup v. Pathe Exchange, 263 U. S. 291, 44 S. Ct. 96, 100, 68 L. Ed. 308."
>
> "* * *
>
> "When and after the films arrive in this state they are exhibited in local theaters for the joint benefit of the local exhibitors and the film owner.

> The proceeds of those wholly local exhibitions, which are paid to and received by the film owner are the sole basis for the tax. As I see it, such proceeds are wholly derived from the local exhibitions."
>
> * * *
>
> "No such question involving earnings through local exhibitions was involved in the Binderup Case, supra, and not even remotely did the court undertake to decide such an issue. On the contrary, the court clearly pointed out that no such question was involved, saying: 'The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause. * * *"

We, therefore, respectfully submit that the holdings of the Louisiana and the Washington Courts, whether they erred in applying the principles announced in the *Binderup case,* or whether in construing the application, force and effect of their own State statutes they were correct in their conclusions, are not in the last analysis persuasive authority, much less binding authority, upon this Court, in deciding the question of whether or not the instant tax which is patently drawn to apply only to a local transaction, and sought to be enforced only with respect thereto, is valid and enforceable with respect to the receipt of income by appellee from the purely local exhibition of its films over which it exercises a marked degree of control and supervision, and which said exhibition is the one outstanding valuable thing to the appellee relative to its whole activities, and which we conceive all other activities to be merely incidental or supplemental thereto.

CONCLUSION

In conclusion, it is respectfully submitted: (1) that aside from any connection with interstate commerce appellee is doing business in West Virginia; (2) that for purposes of Federal regulation or supervision the activities sought to be taxed may be considered interstate in character, yet that presents no obstacle to the power of West Virginia to tax this activity, purely local in character; (3) that the exhibition of appellee's films in West Virginia is a purely local activity subject to a nondiscriminatory tax by the State, and any resultant burden on interstate commerce is indirect and incidental, for the reason that (a) the mere formation of the contract does not place appellee's activities within the protection of the commerce clause; (b) the exhibition of appellee's films in West Virginia is a purely local activity, interstate commerce being merely incidental thereto; (c) any resultant burden of the tax falls only remotely and incidentally on interstate commerce, hence the same is valid; (d) the West Virginia tax is not one which in form or substance can be repeated by other States in such a manner as to lay an added burden on interstate commerce; (4) that appellee has no right to complain of the tax imposed in this case; (5) that the tax sought to be imposed is not violative of any of the provisions of the Federal Constitution; (6) that the judgment appealed from should be reversed.

Respectfully submitted,

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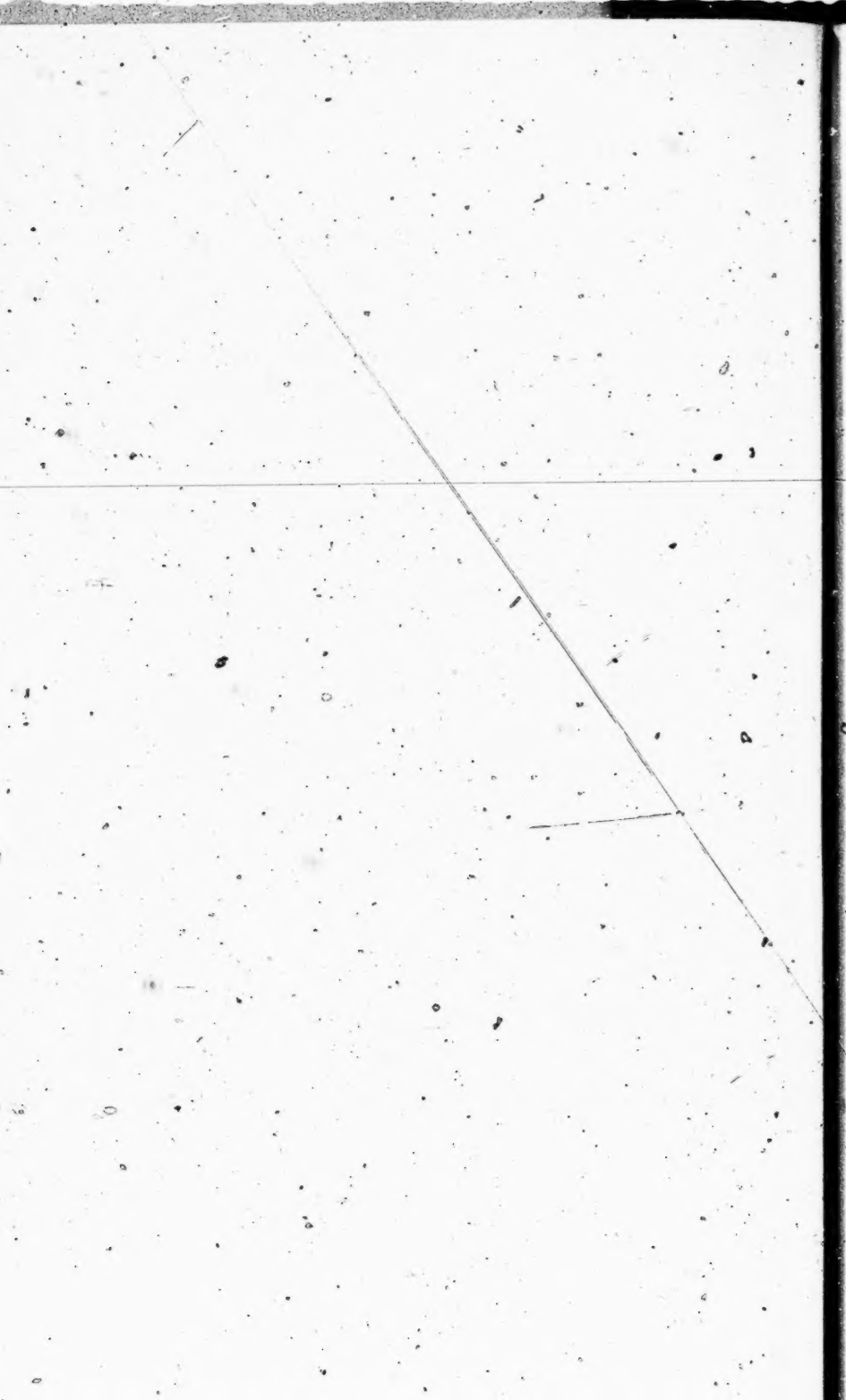

APPENDIX

APPENDIX A.

CHAPTER 86, ACTS OF THE LEGISLATURE OF WEST VIRGINIA, REGULAR SESSION, 1935:

"AN ACT to amend section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, and to amend said article thirteen by adding thereto sections two-(a) to two-(i), inclusive, relating to business, occupation and privilege taxes.

"* * *

"*Be it enacted by the Legislature of West Virginia:*

"That section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, be amended and reenacted and that said article thirteen be amended by the addition thereto of sections two-(a) to two-(i), inclusive, to read as follows:

"Section 2. There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-(a) to two-(i) inclusive, of this article.

"* * *

"Sec. 2-(h). Upon every person engaging or continuing within this state in any service business or calling

not otherwise specifically taxed under this act, there is likewise hereby levied and shall be collected a tax equal to one per cent of the gross income of any such business.

"Sec. 2-(i). Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided*, That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes.

"This act shall take effect as of January first, one thousand nine hundred thirty-five, and the first tax assessed under it shall be upon the calendar year one thousand nine hundred thirty-five."